

NOVA SCOTIA
LEGISLATIVE LIBRARY



PROVINCE HOUSE

7987

Box 115.

IN THE

Supreme Court of Canada, 1881.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

CAUSE.—WILLIAM H. CREIGHTON, Assignee of LEWIS P. FAIRBANKS,
PLAINTIFF AND APPELLANT,

vs.

SAMUEL CHITTICK ET AL., DEFENDANTS AND RESPONDENTS,

AND

CAUSE.—WILLIAM H. CREIGHTON, Assignee of LEWIS P. FAIRBANKS,
PLAINTIFF AND APPELLANT,

vs.

TIMOTHY GRAHAM, DEFENDANT AND RESPONDENT.

APPELLANT'S FACTUM.

JNO. S. D. THOMPSON,

Appellant's Attorney.

RIGBY & TUPPER,

Respondent's Attorneys.

HALIFAX:

WM. MACNAB, PRINTER, 12 PRINCE STREET.

1881.

NC
347.9
C

5-000

Supreme Court of Canada.

CAUSE—WILLIAM H. CREIGHTON, Assignee under the Insolvent Act of 1875
of the estate and effects of LEWIS P. FAIRBANKS, PLAINTIFF
AND APPELLANT,

vs.

SAMUEL CHITTICK, JOSEPH - CHITTICK AND JOHNSTON
CHITTICK, DEFENDANTS AND RESPONDENTS.

APPELLANT'S FACTUM.

IN the year 1826 a company called the Shubenacadie Canal Company was formed in Nova Scotia for the construction of a Canal between the waters of Halifax Harbor and the waters of the Bay of Fundy in that Province. A statute passed in 1824 authorized the Governor of the Province to issue Letters Patent under the Great Seal of the Province to such Company when formed, and conferred great powers and facilities. The Letters Patent were issued in 1826 and the Company commenced operations. The Line of Canal was to be "through the Dartmouth Lakes, the lakes and channels or course of the River Shubenacadie or by or along the banks of such lakes and river to such part of the River Shubenacadie, between its place of discharge into the Basin of Minas and the Great Lake," (sec. 5, Act of 1826.) The Company had power under this Act to do all things necessary for making a canal through these waters, including the right of directing and damming the same. Also to make towing paths along the line of water communication. By section 8, "The course and channel of such canal or water communication and the works to be erected thereon, and the waters and streams of the said river and lakes, so far as the same were or should be required or necessary to be used," &c, for such canal, "and all lands or real estate purchased or obtained for such canal and through which it should be made, and the towing or tracking paths or roads were made the sole and exclusive property of the company for ninety-nine years, and this title was made perpetual by the Act, chap. 17, of 1827. By section 13 of the Incorporation Act of 1826, it was provided, that whenever, for the course, channel or site of such



canal, or the works thereof, or for cutting or opening such canal, or for making or erecting any of the locks, dams, reservoirs, or embankments thereof, or for any of the other purposes mentioned and authorised, the Corporation should find it necessary that any lands lying in the course or direction of the Canal or contiguous thereto, or upon the shores or banks of the said river, lakes or streams, should be purchased by, or vested in, the Corporation, to enable them to make and complete and beneficially use the said canal; then it should be lawful for the Corporation to adopt and take such course and proceedings in regard to such lands and the obtaining the same for its use as by any present or future law of this Province, were or should be enacted or in force, touching the making or altering any public highway through the lands of any private person in the Province; and such proceedings as were or might be requisite for divesting the right and interest of the individual owner of the land required for a public highway, and appropriating such land for the use of the public should be used for divesting the estate and interest of the respective proprietors of the lands required for the use of the Corporation, and vesting such lands in the Corporation. And in every such case, after such proceedings had, and after verdict of a jury taken and confirmed, and the damages assessed in favor of the proprietor paid and satisfied, and all other provisions and requisites in force as respects highways in all particulars observed and confirmed, the said lands and tenements described in, and forming the subject matter of, such proceedings, should be vested in and appropriated to the use of the said Corporation, and should be and remain to, and be enjoyed by, the said Corporation in fee simple.

By Letters Patent 1st June, 1826, these powers were expressly given to the Company, which had then been formed. Also such powers as had previously been granted to Canal Companies in Great Britain, or which might be reasonable and necessary. The Letters Patent also provided that their provisions should be "taken, construed and adjudged in the most favorable and beneficial sense for the best advantage of the Company."

The principal parts of the line of water communication, (as regards extent and value), were the First and Second Dartmouth Lakes; the locus in dispute is part of the First and Second Lakes and also part of the shore of both.

In August, 1826, the Company desired to put in force the provisions above recited, in reference to the expropriation of lands, and accordingly presented to the Custos and other Justices of the Peace of the County of Halifax the petition set forth in the case, and obtained the certificate of three persons who were appointed by the Court of Sessions to report upon their petition, to the effect that the pieces and parcels of land therein described were necessary to be vested in the Company to enable them to complete the canal. The statutory provisions then in force in the Province relating to the expropriation of property for highways are to be found in chapter 2 of the Provincial Acts of 1826, and are as follows:

Section XIII.—And be it further enacted, That where any new highway or common road from town to town, or place to place in any County or District in this Province, shall be wanting, and where old highways or roads with more conveniency may be altered upon application being made to the Court of General Sessions of the Peace within the said County or District, the said Court is hereby authorized and required to appoint three persons, being freeholders of the adjoining Townships, having most occasion for the said highway, to enquire into the necessity and conveniency thereof, and to make their report thereon, and the same being judged to be of common necessity or conveniency, the said Court shall issue a warrant to the

Sheriff or his Deputy to summon a jury out of the adjoining Townships to meet at some convenient day and place therein mentioned, to view and lay out or alter such highway or road, who shall have an oath administered to them by the said Sheriff or his Deputy, who is hereby authorized to administer the same, to lay out or alter such highway or road according to their best skill and judgment, with most conveniency to the public and least prejudice or damage to the owner or owners of the lands on which the said highway is to be laid out or altered, and to assess the damages to the owner or owners of such lands as the said jury shall think reasonable for the value of the land and improvements made on the same; and also for the making of fences on the sides of such highway, which having done, the said Sheriff or his Deputy shall make a return thereof on the day appointed by the said Court, as well under his own as the hands of jurors by whose oath the same is laid out or altered, to the end the same may be allowed of and recorded and after known for a public highway; and all public highways hereafter to be laid out as aforesaid, shall now be less than sixty-six feet wide. 10

The Sessions issued to the Sheriff of the County of Halifax the Precept set out in the case on the 8th August, 1826, and the Inquisition and Return thereon are also set forth at large. It is claimed that the description in the Return beginning "On the second section of the canal line," covers a strip all around the shore of the First and Second Lakes, and includes the locus on which the ice-house of the defendants and the embankment under the ice-house, were afterwards constructed, and on which the defendants afterwards cut ice. These lands were at that time low and swampy, and were afterwards submerged by the raising of the waters consequent on the construction of the Company's dams and other works. The Company entered into possession of the tracts included in the return mentioned. 20

31st May, 1831, the Company executed a mortgage to the Hon. S. S. Blowers and Sir Rupert D. George, Trustees for the British Government (Commissioners of the Treasury), who made a loan of £20,000 stg. to the Company under the Imperial Act of 1st Wm. IV., entitled "An Act to authorize the advance of a certain sum out of the Consolidated Funds for the completion of the Shubenacadie Navigation in Nova Scotia." This mortgage included the two Dartmouth Lakes as well as the other portions of the canal line and also the lands which had been acquired under the Sheriff's inquisition.

In 1837 an act was passed in aid of the Company, and of this act the following abstract is given:— 30

An Act for increasing the Capital Stock of the Shubenacadie Canal Company, and the number of Shares therein, for conferring further powers on that Corporation, and for other purposes.

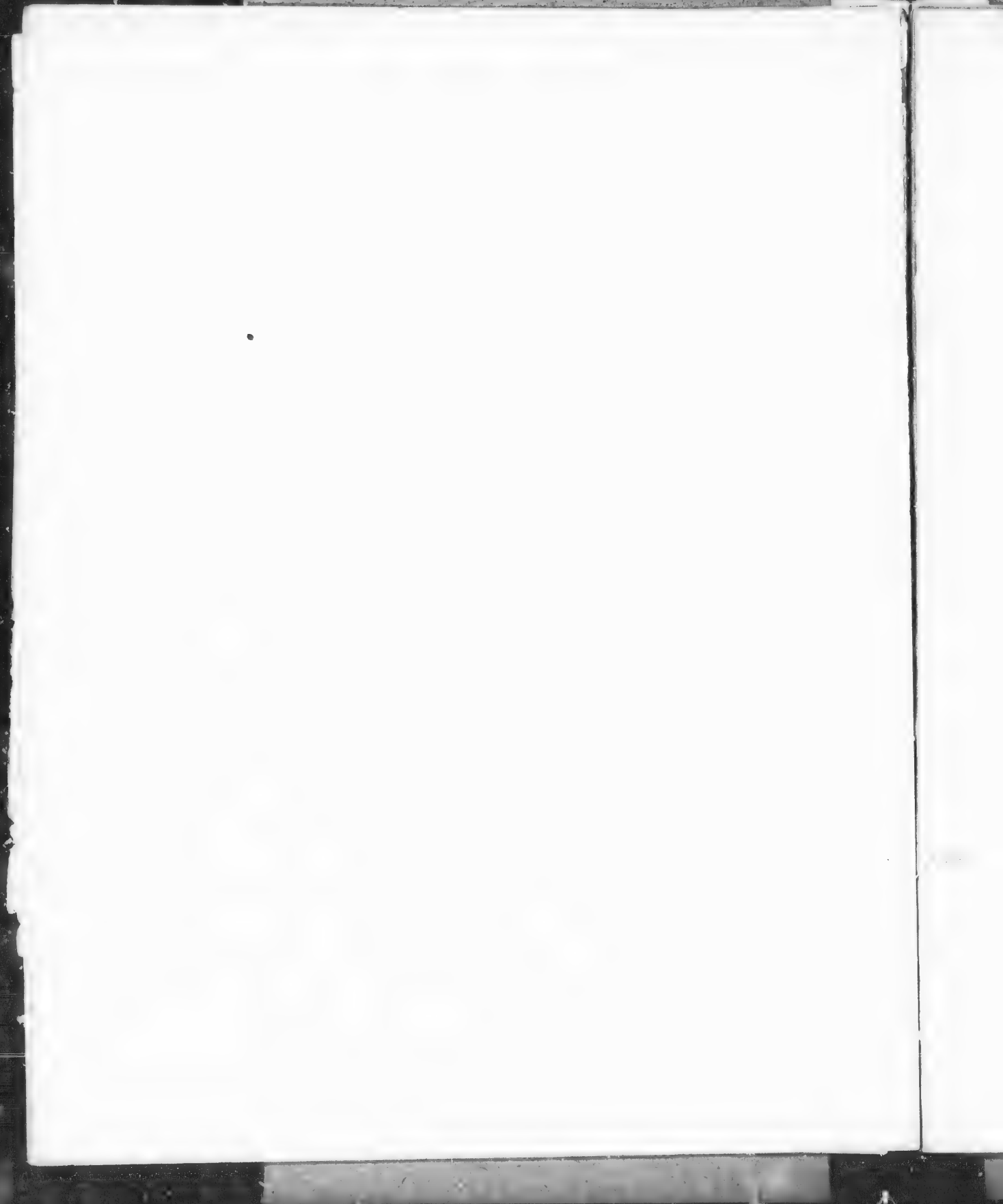
(Passed 21st day of April, 1837.)

Whereas, by an Act of the General Assembly of Nova Scotia, passed in the year of our Lord one thousand eight hundred and twenty-four, and entitled "An Act to authorize the Incorporation of a Company for making a Canal by the River and Lakes of the Shubenacadie," it was enacted that whenever a sufficient number of persons should have associated themselves together for opening and making a navigable cut canal or water communication, between the harbor of Halifax and the Basin of Minas, by, along or near to the course of the river Shubenacadie, and the lakes thereof, and shall have agreed to raise sufficient moneys to effect the same, it should and might be lawful for the Governor, Lieutenant-Governor or Commander-in- 40

Chief for the time being, at any time within five years from the passing of that Act, by letters patent, under the great seal of this Province, to make, erect and incorporate, all and singular, the persons who from time to time should be adventurers in or parties to the said undertaking, and their assigns, into one body, politic and corporate, in deed and in name, under the title of "The Shubenacadie Canal Company," and by that name to have succession, to sue and be sued, to have a common seal, and to possess and enjoy such powers, with respect to the choice of a president and other officers, making by-laws, and regulating the affairs of the said company, as should be expressed in the same letters patent;

And whereas; pursuant to the said statute, letters patent, under the great seal of this Province, and dated the first date of June, one thousand eight hundred and twenty-six, were 10
duly and in conformity to the said Act made and granted, whereby certain persons, inhabitants of Halifax, particularly named in the said letters patent, and their associates, successors and assigns, were incorporated by the name and title, and for the purposes aforesaid, with a capital or joint stock obtained in the first instance to consist of the sum of sixty thousand pounds of lawful money of Nova Scotia, divided into two thousand and four hundred shares, each share being of the sum of twenty-five pounds; but with power to the said corporation to increase such capital stock to such greater sum as the object of the company might require; and the said corporation, under the authority of the said letters patent and of the statute aforesaid, therein recited, and under the additional powers and regulations contained in another Act of the 20
the General Assembly, passed in the year one thousand eight hundred and twenty-seven, entitled "An Act in addition to the Act entitled An Act to authorize the Incorporation of a Company for making a Canal by the River and Lakes of the Shubenacadie," and also, under the by-laws and ordinances of the said company, established by a general meeting of the proprietors of the said company, held in Halifax on the 21st day of February, one thousand eight hundred and twenty-eight, and subsequently duly approved of and established by the then Lieutenant-Governor and His Majesty's Council, commenced their said undertaking, and constructed many large and expensive works for the purposes of the said inland navigation, and proceeded therewith until the end of the year one thousand eight hundred and thirty-one, at an expense for the said canal works of seventy-two thousand pounds and upwards, exclusive of other large sums paid for the purchase of lands for the purposes of the undertaking and for the salary of 30
the engineer employed thereon, and for other charges thereof; when the funds of the said corporation, derived from the grant of fifteen thousand pounds made by the General Assembly of the Province in aid of the undertaking, from part of the capital stock subscribed for in this Province, to the extent of seven hundred and twelve shares from another portion of the said stock subscribed for in England to the extent of twelve hundred and fifty shares, and from the loan of twenty thousand pounds sterling, made in aid of the said work by His Majesty's Government, on the security of the canal, and the tolls and profits thereof, pursuant to an Act of the Imperial Parliament, having become wholly exhausted, the said corporation was compelled to suspend all further proceedings in their said enterprise; and since the said year one thousand eight hundred and thirty-one the works and constructions then in progress have remained and yet 40
are unfinished, for want of the necessary funds required for their completion, and for opening the navigation from the harbor of Halifax to the Basin of Minas.

And whereas, upon a particular survey and examination recently made of the whole line of the said intended water communication, various alterations have been recommended to be



adopted in the line and direction thereof, in its depth and width, and in the position, nature and dimensions of the works, as originally designed, whereby the said canal would be rendered more suitable to the purposes for which a great inland water communication through the Province, with its capital, is required, and be made more conveniently navigable by steamboats and sea-going vessels; and plans and estimates have been made for the further prosecution of the said enterprise in an improved mode, and by works of a more durable character, and of greater extent and magnitude than were first intended, for the expense of which large additional funds will be required by the said corporation; and forasmuch as the completing of the said enterprise is deemed an object of great public utility and importance, it has therefore become expedient to authorize the said company to extend its present capital stock and number of shares, and also to grant unto the corporation certain other and further powers and authorities, and make other regulations as hereinafter contained, for facilitating the enterprise and works of the company, and for the more convenient management and conduct of its affairs. 10

1. *Be it therefore enacted by the Lieutenant-Governor, the Council and Assembly.*—(Marginal notes.) Joint stock may be increased to £250,000; proviso; preamble.

2. *Be it further enacted.*—(Marginal notes.) Board of directors; preamble.

2. *Be it therefore further enacted.*—(Marginal notes.) Lieutenant-Governor may appoint four additional directors; vacancies occurring in the board of directors.

4. *And be it further enacted.*—(Marginal note.) Directors may be re-elected.

5. *And be it further enacted.*—(Marginal note.) Omitting to choose directors at annual meeting. 20

6. *And be it further enacted.*—(Marginal notes.) Omitting to hold annual general meeting; new board of directors to be brought into operation.

7. *And be it further enacted.*—(Marginal notes.) Restriction on corporation respecting holding real estate repealed; preamble.

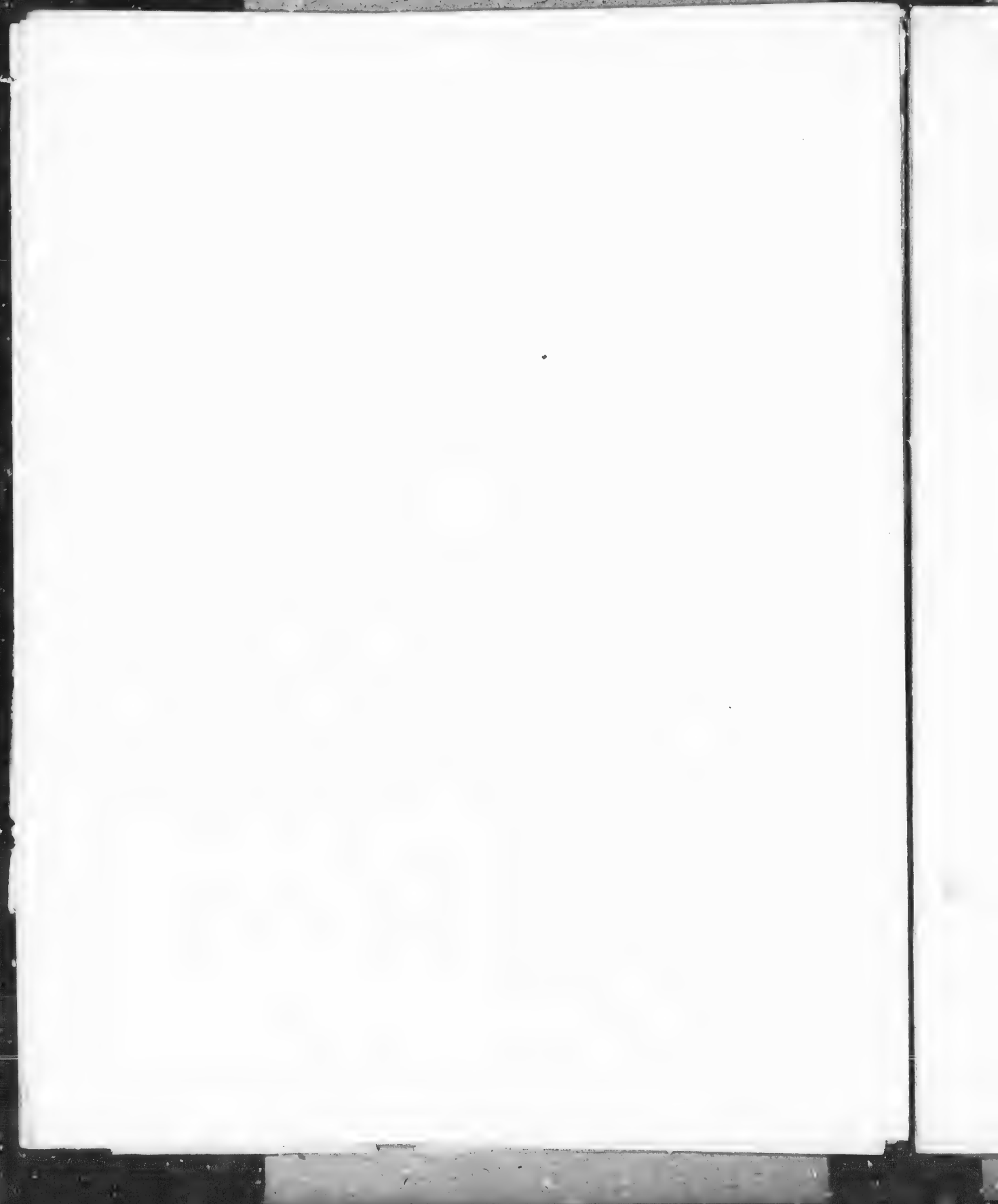
8. *Be it therefore enacted.*—(Marginal note.) Additional powers, authority and privileges conferred on corporation.

9. *And be it further enacted,* that all water powers and privileges, and all quantities of water, to be procured by means of any weirs, dams, embankments, aboiteaux, or other works, now or hereafter to be by the said company built, constructed, raised or formed, in, upon, across 30 or near to the said navigation, or the said rivers, creeks, streams or brooks thereof, and all deposits of soil, accretions and alluviums in the present channels, caused by or necessarily consequent upon any of such their works, shall be vested in the said corporation, and shall or may be sold, leased, or otherwise disposed, appropriated and applied, for such payments, and under such conditions as to them shall seem fit.

10. *And be it further enacted.*—(Marginal note.) Corporation making bridge over Shubenacadie entitled to toll.

11. *And be it further enacted.*—(Marginal notes.) Complaints of damages by canal to adjoining lands; proviso.

12. *And be it further enacted,* that all such parts of the said river Stewiacke, the Nine 40 Mile River, or other rivers, creeks, brooks and streams flowing into the river Shubenacadie on either side, as shall be rendered navigable by the works of the said company, shall be and be deemed part and parcel of the canal or navigation authorized to be constructed by the said corporation.



And whereas, the method now by law provided for enabling the said company to obtain the title and possession of any land or real estate required for the purposes of the said navigation has been found very expensive and inconvenient,—For remedy whereof:

13. *Be it further enacted.*—(Marginal note.) Lands in vicinity of canal required by corporation.

14. *And be it further enacted.*—(Marginal note.) Fee simple in lands secured.

15. *And be it further enacted.*—(Marginal note.) Land may be taken by appraisement.

16. *And be it further enacted*, that all and singular the provisions of the thirteenth section of the additional Act aforesaid, with respect to the proceedings touching the appraisement of damages occasioned by the acts of the company, shall be applicable to, and be 10 observed and in force, with regard to all the proceedings hereby authorized to be taken for vesting lands in the said corporation, and as fully as if the said thirteenth section were herein repealed for that purpose.

17. *And be it further enacted.*—(Marginal notes.) Vested right in land commences when award is paid; preamble.

18. *Be it further enacted.*—(Marginal note.) Appropriation, &c., of award.

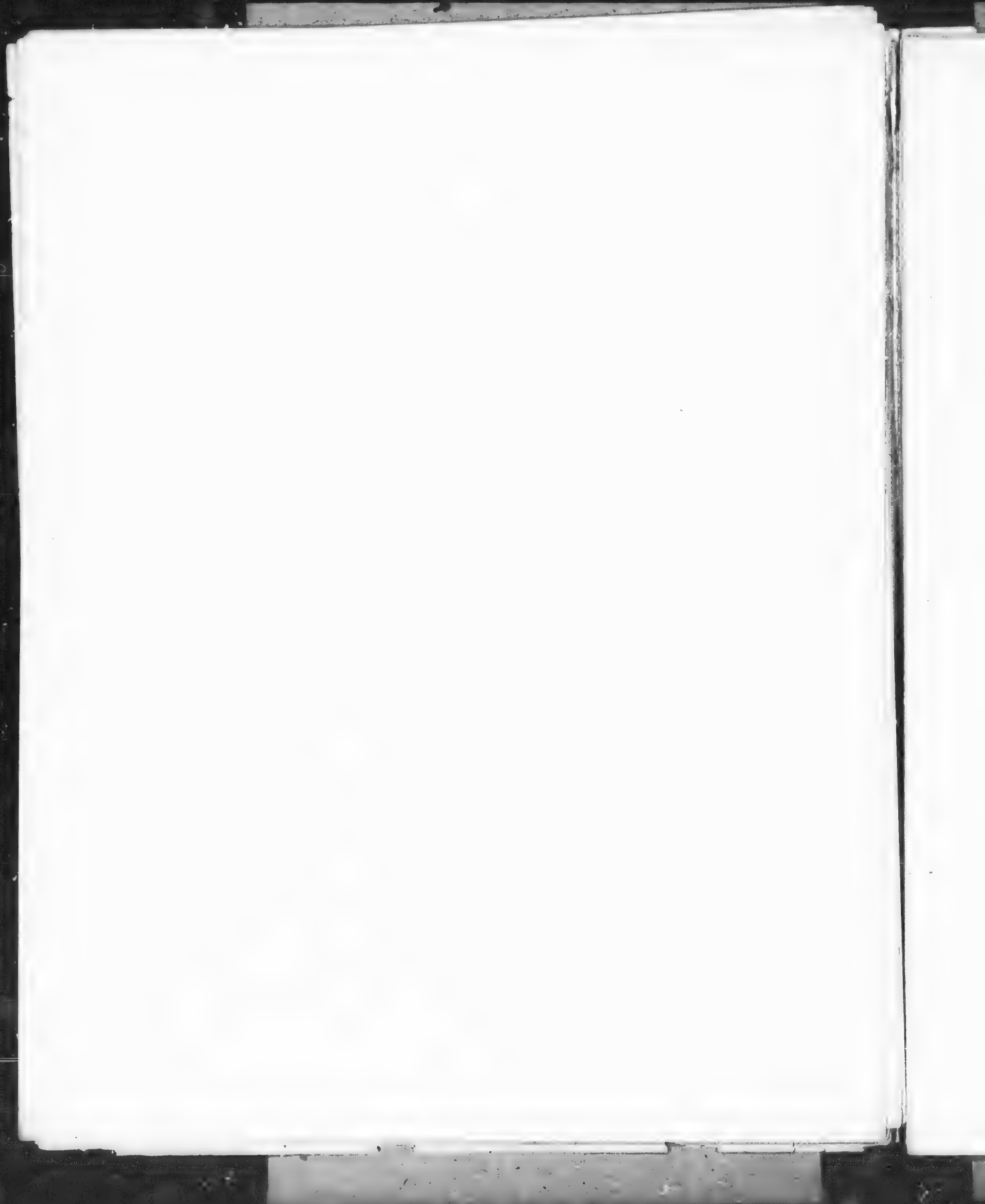
And whereas, by reason of the suspension of the operations of the company as aforesaid, after the choice of the new members for the board of directors made at the general meeting of the company, held in February, one thousand eight hundred and thirty-two, to supply the vacancies then existing; and by reason of their having since been no annual meeting held for 20 supplying vacancies in the said board, the affairs and business of the company have been since managed by the board, constituted of the then continuing and of the newly chosen directors, or by such of the latter as attended the meetings of the said board.

19. *Be it therefore enacted*, that the board of directors of the said corporation as composed of the directors who continued in office on the first day of March, one thousand eight hundred and thirty-two, and of such of the new directors as then came into office, and have since attended the meetings of the board, shall be and be deemed and continue to be the board of directors of the said company, by the statutes, charter and by-laws aforesaid. *Provided*, until the new board of directors designed by this Act shall be established, and all resolutions, orders, acts, affairs and business, made, transacted or done, or to be hereafter made, transacted 30 or done, by the said board, when seven members attended or shall attend thereat, shall be deemed and be resolutions, orders, acts, affairs and business, made, transacted and done by the board of the Shubenacadie Canal Company, until the new board aforesaid be established. *Provided always*, that nothing herein contained shall prevent any member of the existing board from resigning his office at his pleasure.

The mortgage to Blowers and George was foreclosed, and the property sold by James W. Nutting, a Master in Chancery, 11th June, 1851, to the Hon. James McNab.

On the 1st May, 1852, the Sheriff of the county of Halifax sold under execution against the company, and conveyed certain lands which may not have been expressly included in the mortgage to Blowers and George. At this sale also the Hon. James McNab was the purchaser. 40

On 21st September, 1852, the same sheriff, under another judgment sold and conveyed certain other lands of the company to Hon. James McNab.



On 1st January, 1853, Hon. James McNab made declarations of trust, by which he declared that under the three conveyances last recited he held the properties therein conveyed for the benefit of the Province, and that he would convey the same to such persons as he might be directed to convey them to by the Lieut.-Governor in Council.

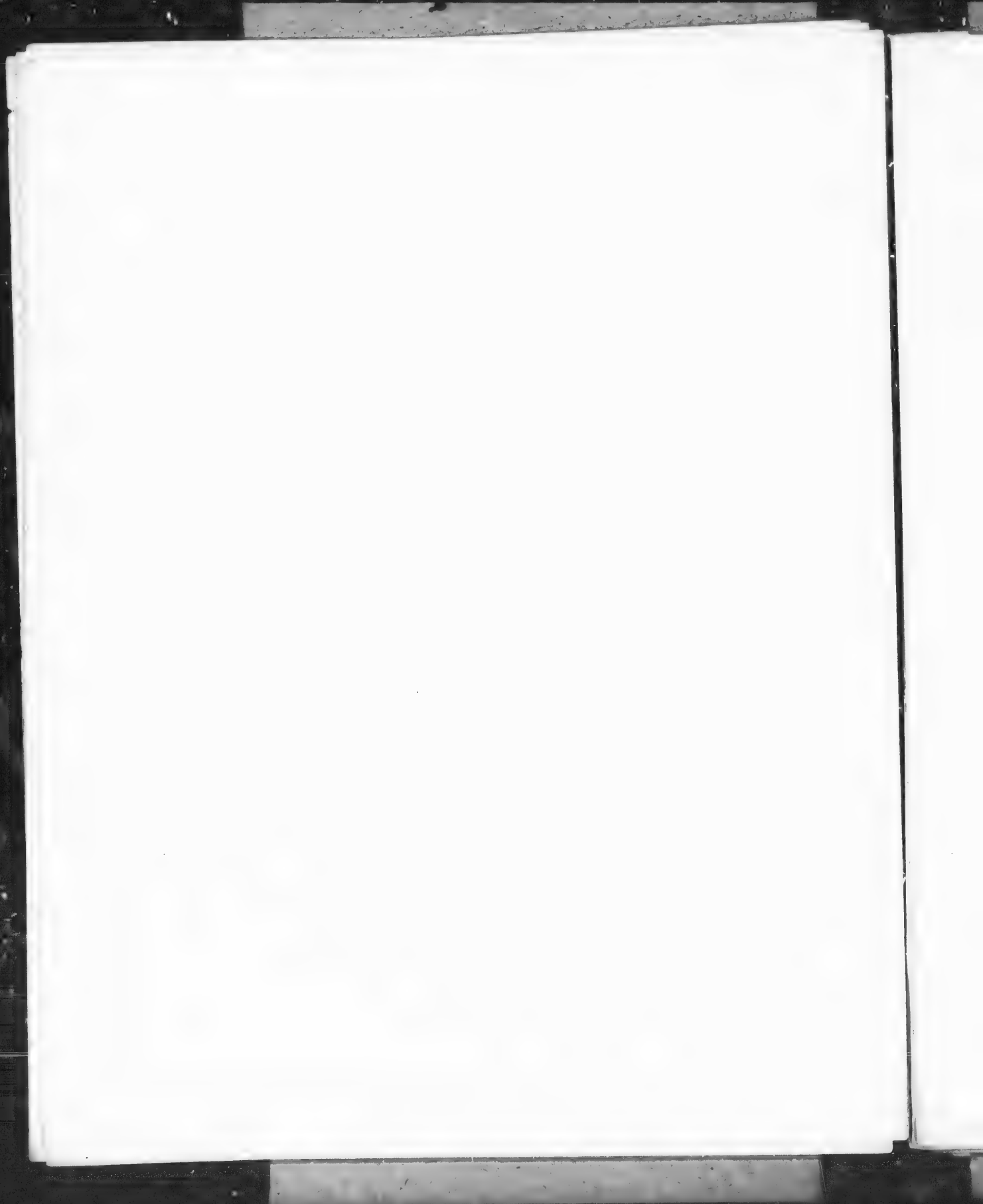
On 4th April, 1853, the following Act was passed by the Legislature of Nova Scotia:—

AN ACT TO INCORPORATE THE INLAND NAVIGATION CO.

(Passed the 4th day of April, A. D. 1853.)

Be it enacted by the Governor, Council and Assembly as follows:—

1. James F. Avery, Andrew McKinlay, William Stairs, William B. Fairbanks, William Lawson, David Allison, Lawrence Hartsburne, Thomas Bolton, James Thompson, Charles W. 10
Fairbanks, George A. S. Crichton, and all other persons who shall become proprietors in the company, hereby established, their successors and assigns, shall be a body corporate, by the name of "The Inland Navigation Company."
2. The company may purchase and hold real estate, and sell or let the same; the real estate to be held at any one time not to exceed in value the sum of ten thousand pounds.
3. The capital stock of the company shall be thirty thousand pounds, to be divided into one thousand and five hundred shares of twenty pounds each.
4. Any of the persons named herein may, immediately after the passing hereof, open a subscription book for shares, and give public notice of the opening thereof for at least thirty 20
days, in two or more of the newspapers published in Halifax; and no person shall be allowed to take more than twenty-five shares, until the expiration of such thirty days, when, if any of the shares shall then remain unsubscribed for, any person may subscribe therefor, notwithstanding such person may have before taken twenty-five shares.
5. As soon as the sum of ten thousand pounds of the stock shall be subscribed for, and one thousand pounds paid in on account thereof, the shareholders may hold their first meeting, and thereat appoint their officers, namely: a president, two directors, an engineer-in-chief, and such subordinate officers as they may deem necessary.
6. When the company shall be invested by the Provincial Government, in consideration of such sum or money as may be mutually agreed upon, not to exceed five thousand pounds, 30
with the land, and land covered with water, locks, and other works and appurtenances, formerly belonging to the Shubenacadie Canal Company, or any part that may be required by the company and agreed to by the Government, it shall be lawful for the company to open and cut a sufficient canal or water communication from the waters of the harbor of Halifax through the Dartmouth lakes, so called, the lakes and channels or course of the river Shubenacadie, or along the sides and banks of such lakes and river to such part of the river between its place of discharge in the Basin of Minas and the Great Lake, and in so doing, to use, deepen, contract or widen, or otherwise alter the channel formerly cut and opened by the Shubenacadie Canal Company, as shall be proper for making a continuous navigable channel or canal for the passage of boats or vessels to and from the Basin of Minas and the harbor of 40
Halifax, respectively, and for such purpose to dig, excavate and clear such locks, pits, cham-



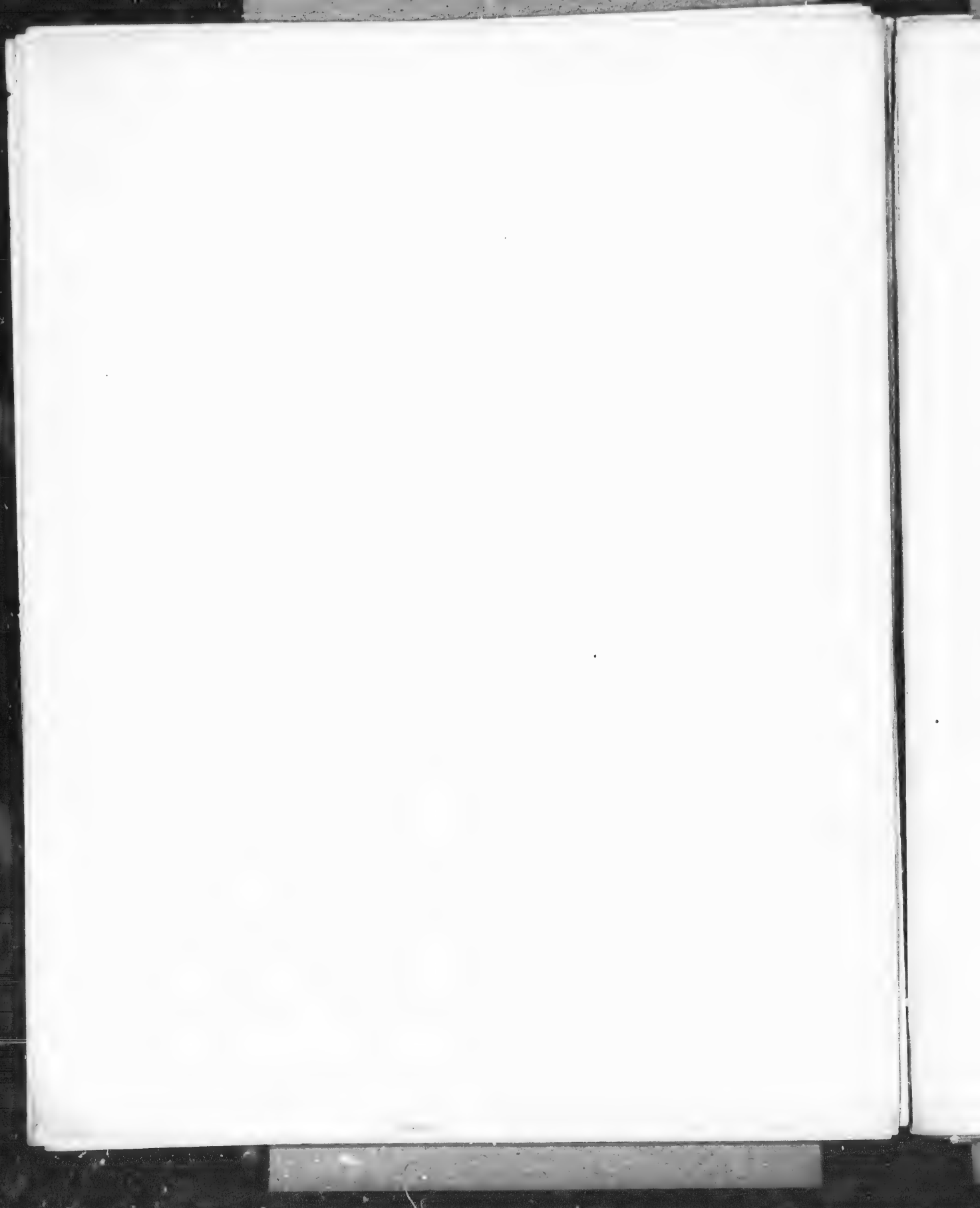
bers or basins, and make, build or renew such locks, sluices, wears, dams or embankments, in, over, across or upon the course of such river, or along the sides thereof, or at or near the several lakes or streams connected therewith, as may be necessary for effecting such inland water communication, at all parts of such river, lakes or streams, and in such courses and directions, from one part to another of the same as may be deemed proper, and to build any slips or lines of railway which may be necessary in the course of such inland water communication, and to use the channels and waters of such rivers, lakes and streams, in every way necessary for constructing such inland water communication, and for rendering and keeping the same at all times navigable and in operation.

7. The company shall have power to make all necessary towing paths or roads along the shore, banks, or sides of the inland water communication, for the tracking or towing boats or vessels along the line thereof. 10

8. The inland water communication and towing paths shall, at all convenient times after the construction hereof, be kept open for the use of the public, their boats, vessels, goods, horses and cattle, upon the payment of a certain rate of toll money, to be regulated by the company, and approved of by the Governor in Council, and revised every five years.

9. Whenever the line of such inland water communication shall be crossed by any public highway now existing, or hereafter to be by law established, the company, at its own cost, shall be obliged to erect a convenient and substantial bridge for the use of such highway, to be open to the public at all times. 20

10. Whenever it shall be necessary in the construction of such inland water communication that the company shall be invested with any lands in the line thereof, or contiguous thereto, and no agreement can be made for the purchase thereof, it shall be lawful for the president and directors to apply, by petition, either in term time or vacation, to any two of the Judges of the Supreme Court, setting forth the nature and situation of the lands required, the names of the owners thereof, and praying the conveyance thereof to the company,—whereupon such Judges shall appoint a time and place for considering such petition, and shall direct a proper notice in writing to be served on the owners of the lands, if in the Province, and if absent, to be published for the period of one month, in at least two of the Halifax newspapers, requiring them to attend, either in person or by their agent or attorney, at such time and place; and in case such owners shall attend, the Judges shall require the president and directors to nominate one appraiser, and such owner two appraisers; and the Judges shall nominate two appraisers; but in case such owners do not attend, the Judges shall, on proof of such service, or publication of such notice, nominate four appraisers, and shall, by an order in writing, direct the said five appraisers to value the lands so required; and the appraisers, having first subscribed an affidavit in writing, to be sworn to before a Justice of the Peace, to be annexed to such order, to the effect that they will faithfully make such appraisement, shall, with all convenient speed, proceed to and appraise such lands, and shall make such appraisement in writing, and return it with such order and affidavit to the two Judges, who, if they approve thereof, shall confirm the same; and the company, upon paying or tendering the amount of such appraised value, and the expenses of the owners in such appraisement, and registering such order, affidavit, appraisement and confirmation in the office of the Registrar of Deeds, in the county where such lands lie, who is hereby required to register the same, shall be considered the owners of such lands. 40



11. The company may, from time to time, enter upon any lands not under cultivation, and there cut down any trees, prepare any timber, and quarry and dig any rock or other materials there found, and work, prepare, and carry away the same for the use of such inland water communication; and if the parties having the property in such lands, or materials, shall refuse to agree with the Company therefor, and for any damages occasioned thereby, or shall refuse such reasonable compensation as may be tendered therefor, the same shall be settled by arbitration, under chapter eighty-seven of the Revised Statutes, but the company shall not take or use any such materials as may have been previously wrought or prepared without the consent of the parties entitled thereto.

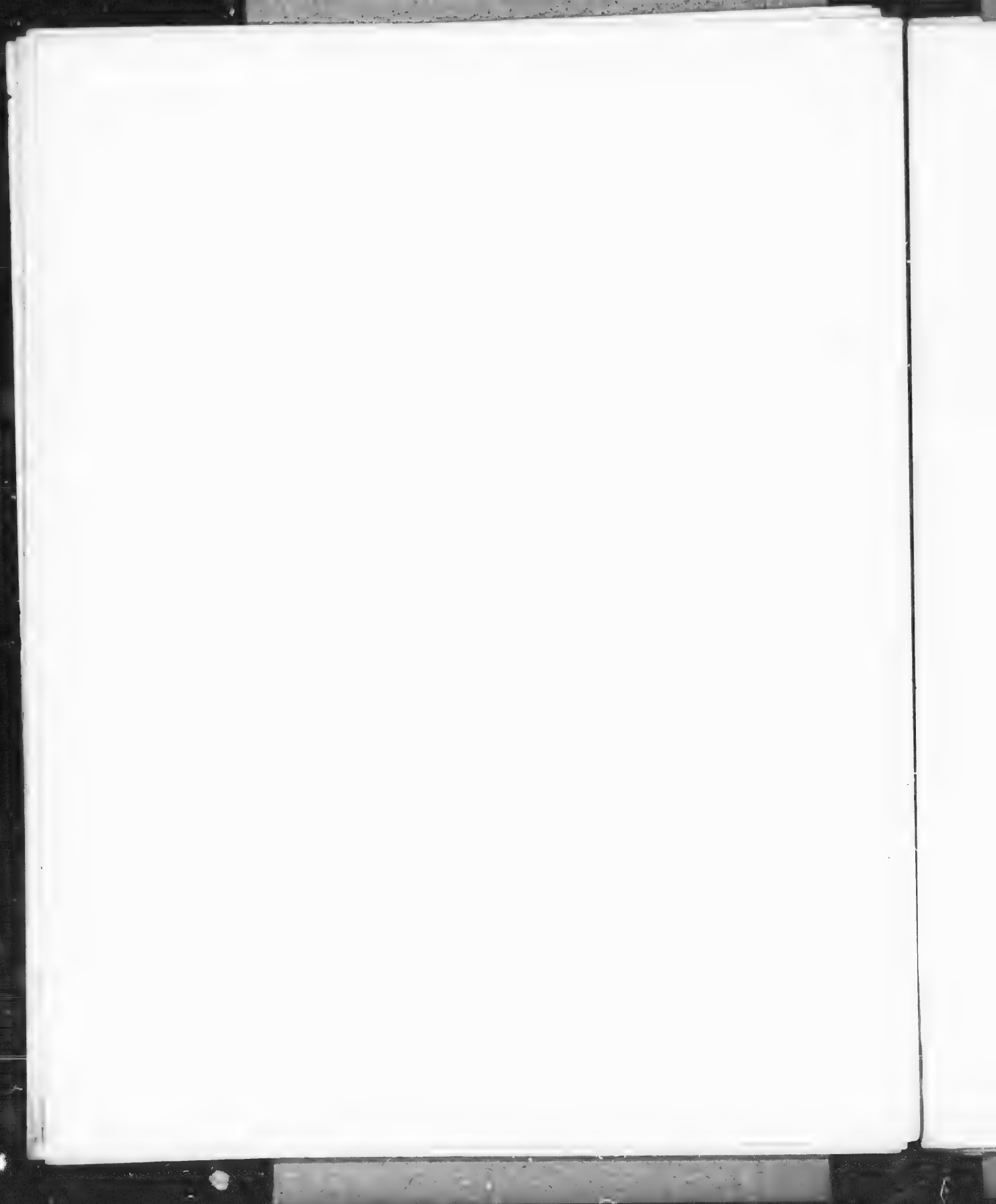
12. In case any wear or embankment shall be made across the present course of the river Shubenacadie below the Great lake, the company shall make and maintain a sufficient fish ladder or waste gate, with proper grates and valves, for allowing at all proper seasons the passage of fish up and down such river, the company in respect of making and maintaining such fish ladder or waste gate, to be subject to the rules, fines and forfeitures contained and imposed in and by chapter 95 of the revised statutes, "Of river fisheries," and all acts in amendment thereof.

13. The company shall not divide over twelve per cent. on the paid up capital thereof, after the payment of the current expenses, but may put the surplus receipts over the above twelve per cent. into a casualty fund until such fund amounts to a sum equal to one fourth of the capital stock of the Company, and which may be invested in such stock or securities as the company may think fit, and then the surplus earnings of the company, over and above twelve per cent. may be used in the repairing, improving, or extension of the works of such inland water communication.

14. No shareholder shall be liable on account of the debts of the company for a greater amount than double the amount of the stock held by him, deducting therefrom the amount paid to the company on account of such stock, unless he shall have rendered himself liable therefore by becoming security for the debts of the company.

15. The legislature may, at its option, at any time after twenty years from the passing of this act, take such inland water communication, with all the works and appurtenances thereof, and keep the same in operation for the benefit and under the control of the government, on paying to the company a sum equal to twenty years' purchase of the annual profits divisible upon the subscribed and paid up capital stock of the company, provided such average rate of profits shall not be less than eight per cent.

16. Full and true accounts shall at all times be kept by the directors of the company of all sums of money received and paid on account of such inland water communication; and the company shall once in every half year cause a half yearly account in abstract to be prepared, shewing the total receipt and expenditure on account of the said inland water communication for the half year ending the thirtieth day of June, and the thirty-first day of December respectively, under distinct heads of receipt and expenditure, with a statement of the balance of such account, duly audited and certified under the hands of two or more of the directors of the Company, and shall send a copy of such account to the Provincial Secretary, on or before the last days of August and February respectively; and it shall be lawful for the governor in council, if they shall think fit, at all times, to appoint any proper person or persons to inspect



the accounts and books of the company ; and it shall be lawful for any person so authorised, at all reasonable times, upon producing his authority, to examine the books, accounts, vouchers, and other documents of the company, at its principal office or place of business, and to take copies or extracts therefrom.

17. No tolls shall be charged for the conveyance of Her Majesty's mails or of troops, or of troops and munitions of war, over the inland water communication established by this act.

On 10th June, 1854, Hon. James McNab, with the consent of the Provincial Government, conveyed to the Inland Navigation Company all the lands which had been conveyed to him by the deed from Nutting and the deeds from the Sheriff.

On 30th April, 1860, the Inland Navigation Company mortgaged all their lands to George 10 H. Starr, John Stairs, and Martin Pinkney Black, for £10,000.

On 1st September, 1860, the Inland Navigation Company mortgaged the same properties to the same parties for £15,000.

These mortgages were made in pursuance of powers given in the Act next set forth, and after reciting the same.

CHAPTER 89.

An Act for the relief of, and in further amendment of the Act to Incorporate the Inland Navigation Company.

(Passed the 15th day of April, A. D. 1859.)

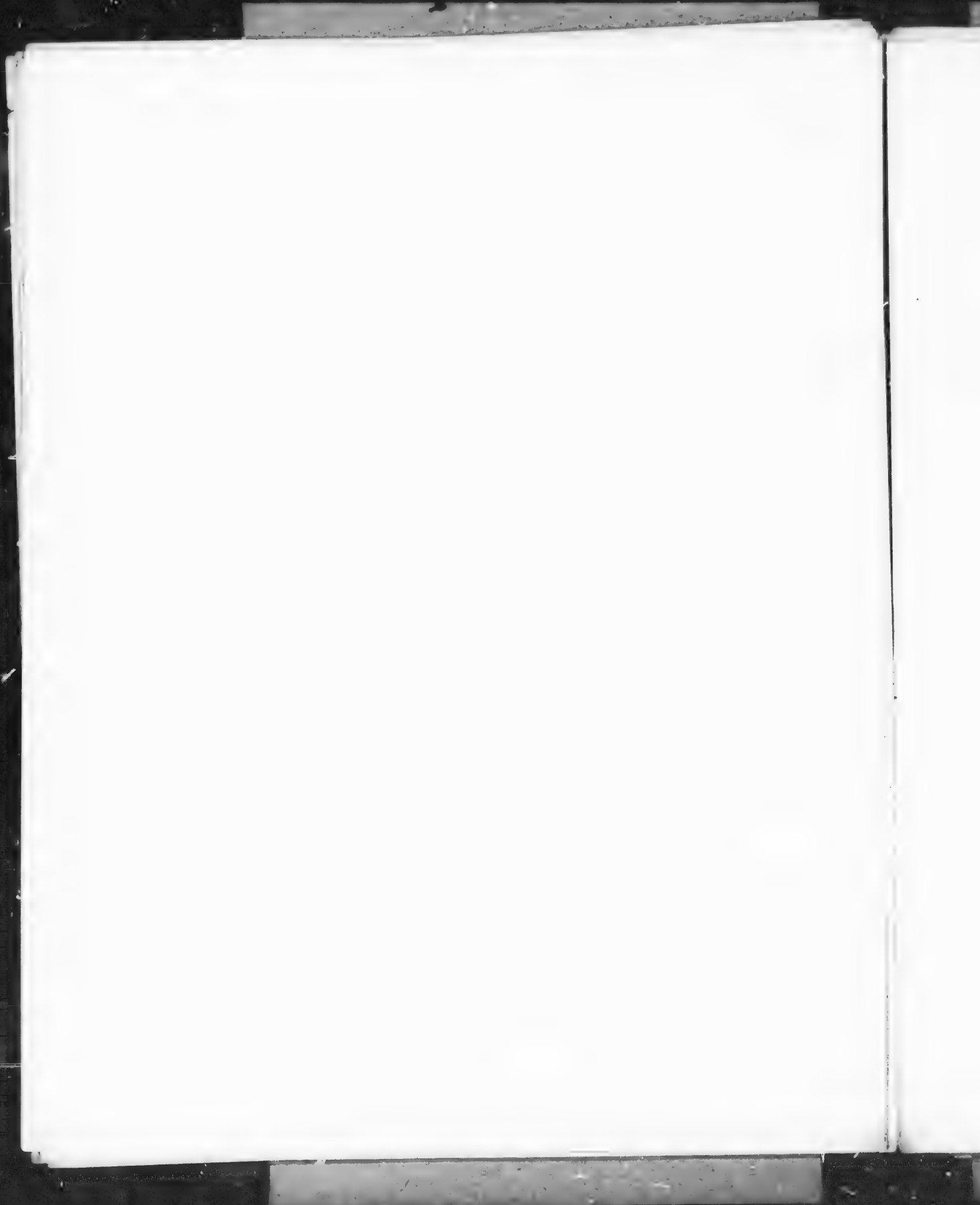
Be it enacted by the Governor, Council and Assembly, as follows :—

20

1. The period of five years limited in and by the deed, dated the tenth day of June, in the year of our Lord one thousand eight hundred and fifty-four, from the Honorable James McNab, the then Receiver-General for the Province of Nova Scotia, to the above named company, of the lands, lands covered with water, locks and other appurtenances, formerly belonging to the Shubenacadie Canal Company, for the completion of the canal or inland water communication, for the passage of boats or vessels to and from the Basin of Minas and the Harbor of Halifax, respectively, is extended to the further period of three years, to be computed from the tenth day of June, which will be in this present year of our Lord one thousand eight hundred and fifty-nine.

2. The sum of five thousand pounds, heretofore loaned by the Honorable Provincial 30 Government to the above company, and all interest since accrued thereupon, is remitted to such company, and the directors thereof, and all the property and works of such company are released from all charge or liability for, or in respect of, such sum and every part thereof, and all interest, as aforesaid.

3. The board of directors of the Inland Navigation Company is authorized to borrow all and every such sum or sums of money as they may deem necessary, for finishing such canal



or inland water communication into the Harbor of Halifax, or which they, at any time or times hereafter, may require for finishing and completing the same, and all works and improvements, as aforesaid, which they may think necessary therefor, and also for the purpose of paying and discharging all legal and just outstanding claims against the company, either by way of mortgage or preferential stock secured upon the company's property and works, and at and upon such rate of interest as they may be enabled to obtain the same, and that all and every deed, conveyance, or mortgage made and executed by the directors of such company of the property and works of the company, for securing the payment of all and every such sum or sums of money to be borrowed in the terms of this Act, shall be a good, legal and valid charge and lien upon such property and works, binding the same, and every part thereof, from the time such deed, conveyance or mortgage is given, any clause, matter or thing in the said deed from the Honorable James McNab to such company, or in the Act incorporating such company, or in the several Acts thereafter passed altering, amending, or in relation thereto, to the contrary notwithstanding. Provided, however, that no stockholder of such company, or subscriber to such preferential stock, shall be liable for or in respect of such sum or sums of money so borrowed under the terms of this Act, or interest to accrue thereupon, for any further or other greater sum than the actual amount or sum so taken or subscribed in and to such stock by such stockholder or subscriber, respectively, notwithstanding any Act, clause matter or thing contrary thereto contained in the Act incorporating such Inland Navigation Company, or the several Acts thereafter passed altering, amending, or in relation to such Act.

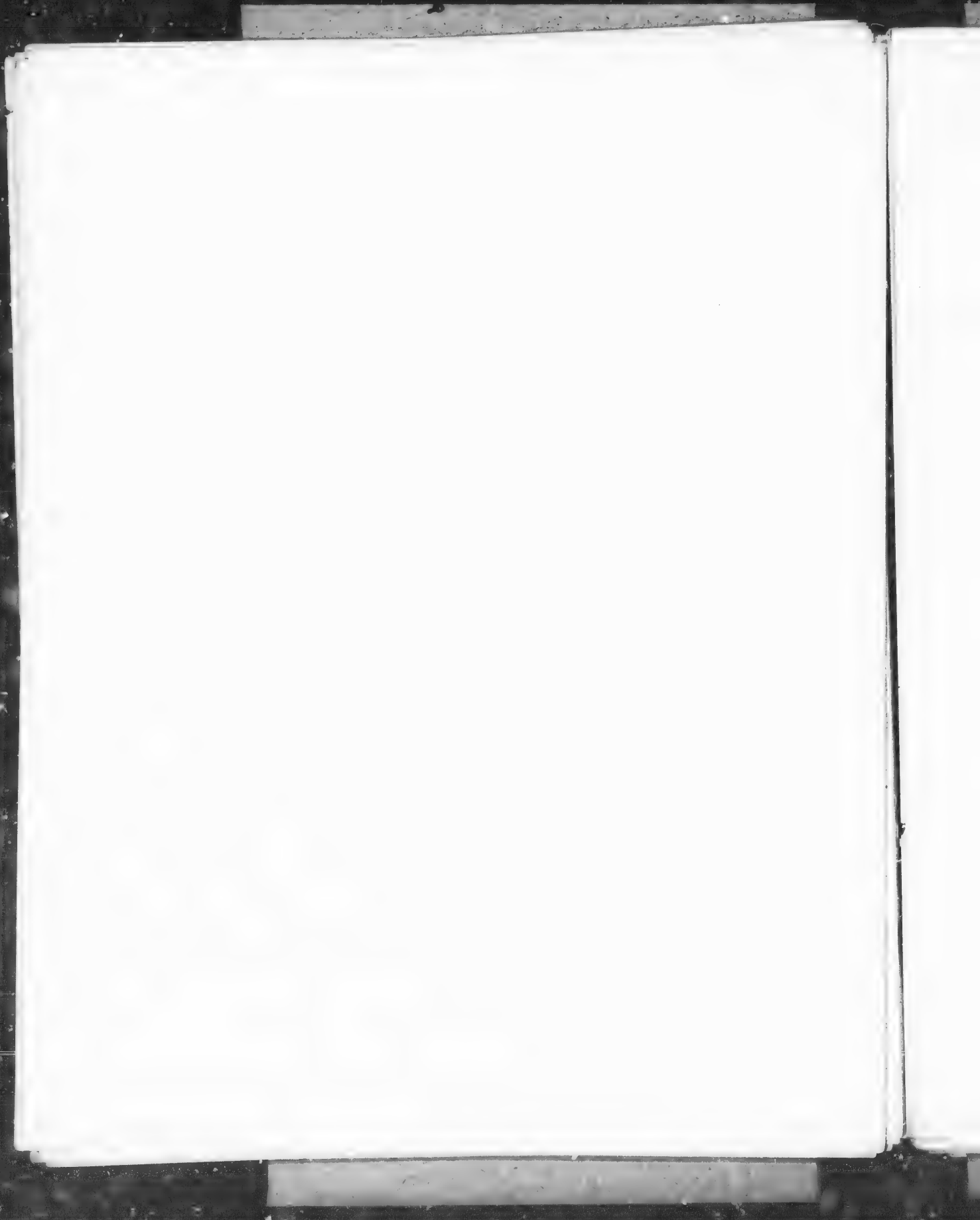
4. The directors of such company shall, at any time, and at all times hereafter, be at liberty to sell and dispose of all or any part of the lands and property contained in the before-mentioned deed, which they may deem not actually required for the due and convenient working of such canal or inland water communication, anything contained in the before-mentioned deed, in such Act of incorporation, and the several Acts heretofore mentioned altering, amending, or in relation thereto, to the contrary notwithstanding.

5. The president and any one or more of the directors shall make and execute a bond to the Receiver-General of the Province, or to such person or persons as Her Majesty's Provincial Government shall appoint, binding themselves in a sum equal to that raised by them by any of the means aforesaid, to expend all and every such sum in the first instance towards the finishing and completion of the works as aforesaid to the waters of Halifax Harbor, and then to the payment of the outstanding debts of the company now or hereafter to be incurred.

On 19th February, 1862, a certificate was given by the Provincial Government that the Inland Navigation Company had complied with the terms imposed under the deed which transferred the property to them by completing a water communication between the harbor of Halifax and the Basin of Minas, and declaring that the said property was free from any claim on the part of the Government.

In point of fact, the Canal had then been completed.

The mortgages by the Inland Navigation Company to Starr, Stairs and Black, were foreclosed and sold, and the property conveyed by the Sheriff of Halifax County, to Samuel Gray and John Stairs 18th June, 1862; and these persons, on the 9th December, 1862, declared that



they held the property in trust for the Lake and River Navigation Company, to which Company they conveyed, on 1st May, 1867. This Company was formed under a statute of the Province called "An Act for the Incorporation and winding up of Joint Stock Companies," the declaration of the Shareholders and other documents pertaining to the organization forming part of the case.

The Lake and River Navigation Company conveyed all the property to Lewis P. Fairbanks by Deed of April 1st, 1870.

On 31st May, 1876, Lewis P. Fairbanks assigned, under the Insolvent Act of 1875, to the Plaintiff and Respondent, who afterwards became creditors' assignee of his estate and effects.

This concludes the principal chain of title, and it is claimed that thereby the waters of the First and Second Dartmouth Lakes and the lands covered with the waters thereof, and the margins of these lakes became vested in the Plaintiff. 10

In addition to this chain of title, however, there is another chain by which the rights or alleged rights of other persons in these lands and waters (including the persons under whom the Defendant's claim) became, at an early period, vested in the Plaintiff's grantors, and formed part of the property embraced in the later conveyances above enumerated. Thus:

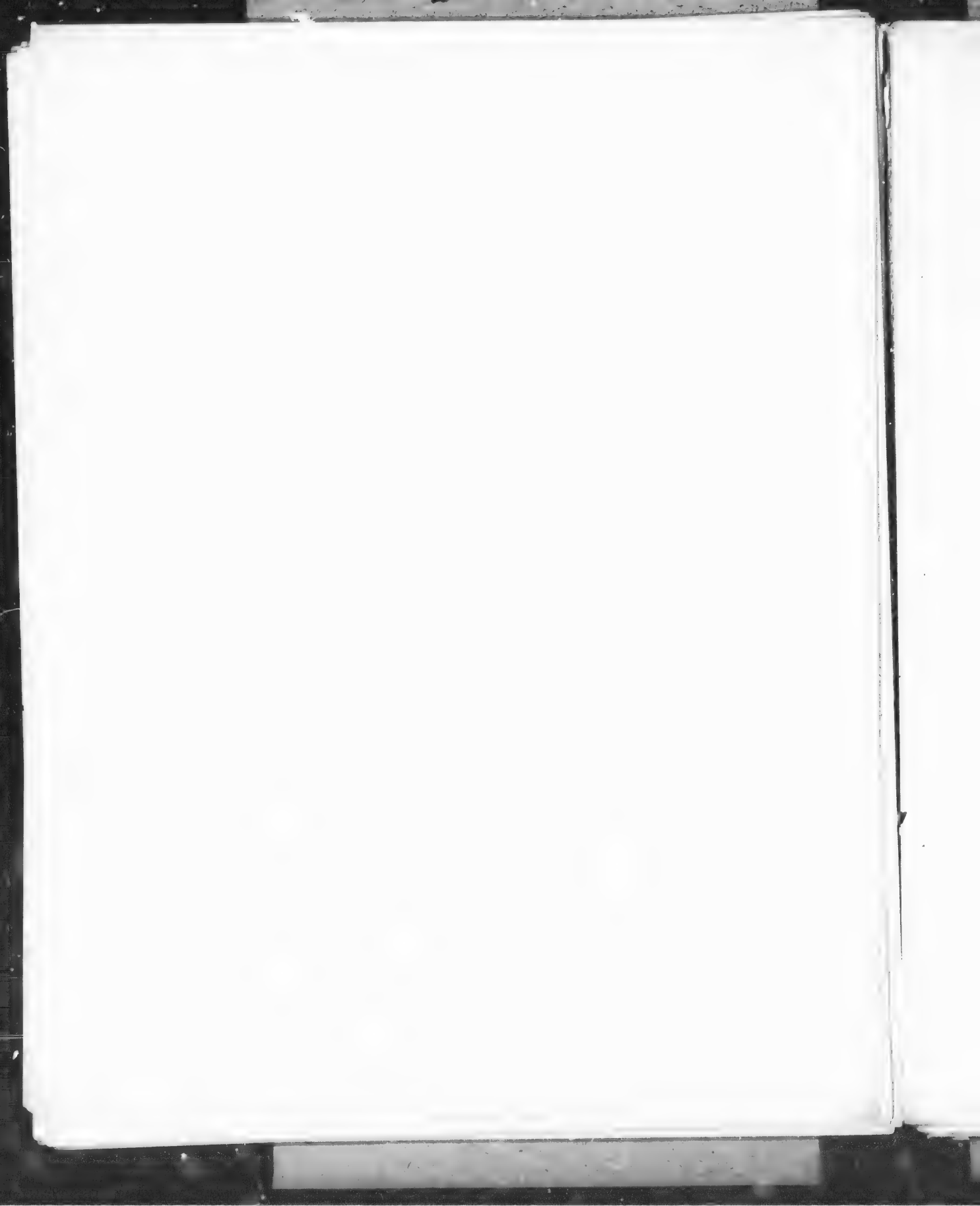
By conveyance of 4th April, 1791, James Creighton conveyed to Lawrence Hartshorne and Jonathan Tremain, the right to enter upon, etc., his lands through and contiguous to which a brook ran, which brook issued from the First Dartmouth Lake, for the purpose of lowering the bank or margin of the lake where said brook issued, and to clear out the bed thereof, and to erect dams on the brook, and to overflow the land of the grantor around the First Lake in order to get a head of water for their mill. This agreement created easements such as may have induced the Sheriff's Jury to treat the owners of that portion of the margin of the lake as "divers persons unknown." 20

On 20th Feby., 1815, the executors of said James Creighton conveyed to Lawrence Hartshorne, one of the above parties, a tract of land on the south eastern side of the First Lake as per plan, marked A A., including the principal part of the locus trespassed on.

On 12th October, 1815, Lawrence Hartshorne conveyed to Richard Tremain one half this and other property, describing it as "that certain lot, etc., lying between the two roads leading from the main road through Dartmouth to the lake as purchased lately at auction, at the sale of James Creighton's estate." 30

By Deed of 14th June, 1816, Jonathan Tremain conveyed his moiety of the same tract to James Tremain. Jonathan had at that time no title to this moiety, but had an equitable right thereto as partner with Lawrence Hartshorne. (See next recited Deed.)

On 25th October, 1828, the Executrix and Executor of Lawrence Hartshorne, made a deed to James Tremain. It recites that said Hartshorne and Jonathan Tremain were jointly interested in these lands, although the title was held by Hartshorne. Also, that Hartshorne, in his life-time, had conveyed a moiety to Richard Tremain as agreed on between them. Also, that Jonathan Tremain had conveyed a moiety to James Tremain, although no deed had been given to Jonathan Tremain. Also, that James Tremain, had applied to the Executrix and Executor for a deed of the moiety so conveyed to him by Jonathan Tremain. Then the deed conveys a moiety of the property so held by Hartshorne, the other moiety of which he had already conveyed to Richard Tremain. 40



By deed of 12th April, 1831, Richard Tremain and James Tremain conveyed all these lands to the Shubenacadie Canal Company, and from this period they formed part of the property of that Company included in the chain of conveyances first above given, and covered by the mortgage from that Company to S. S. Blowers and Sir Rupert D. George.

Thus the Plaintiff claims under the Statutes before detailed, the Inquisition, and the deeds above recited, a complete title to these Lakes and all the adjacent shores and banks and especially such portions of the margin as were flooded by the raising of the waters consequent on the Company's works.

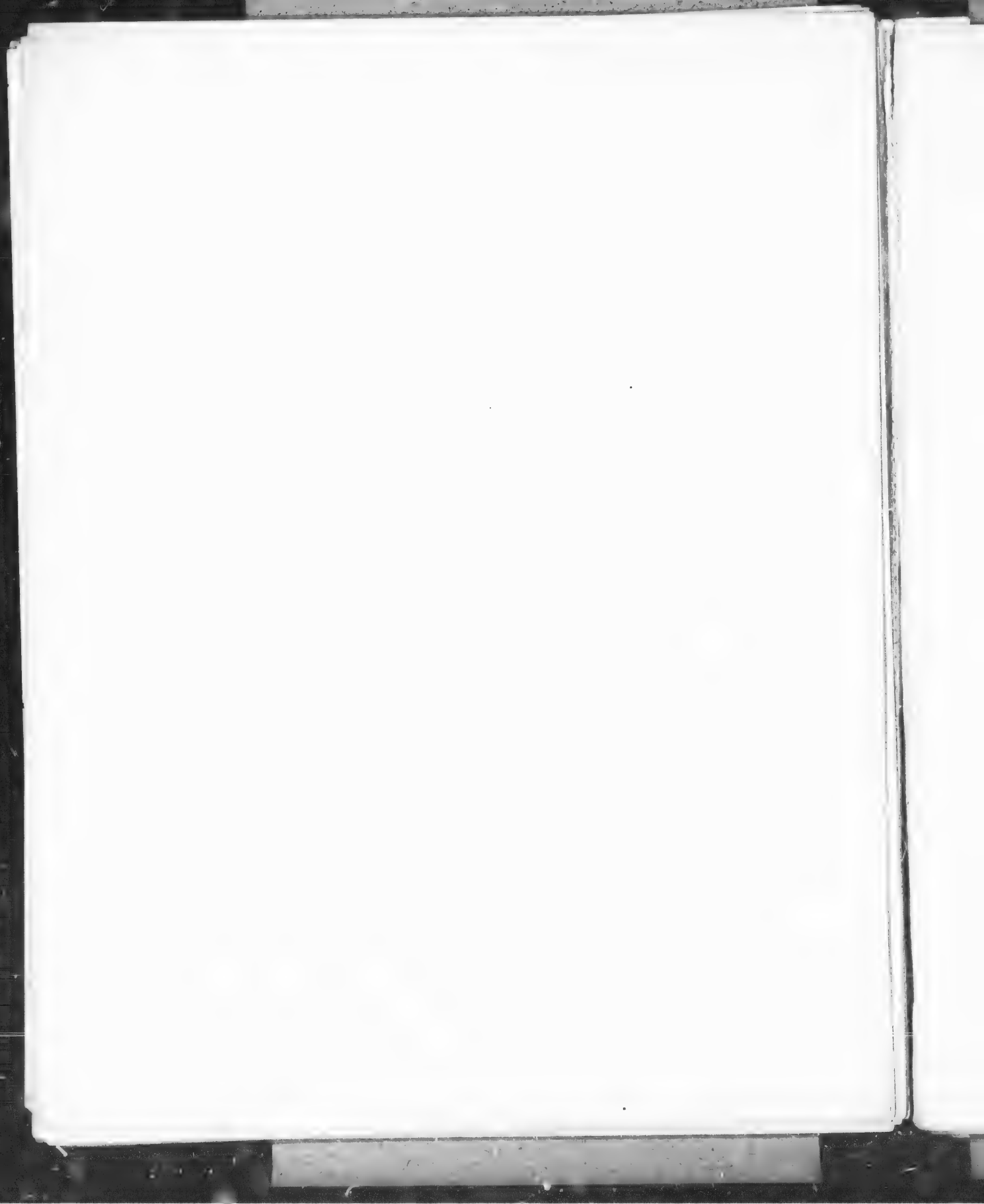
The defendants cut a quantity of ice on the First Dartmouth Lake and took it away. On the shore of the Second Lake they erected an embankment and ice-house thereon, and cut and took away a quantity of ice in front and from the vicinity of the embankment. As to the trespasses on the north-western part of the First Lake, they seek to justify under license from George A. S. Crichton, who, they allege, owned the lake and the land thereunder at that part where the ice was cut. 10

They put in a deed from the executors of James Crichton, Senior, to James Crichton, dated 1st November, 1819. Also a deed from James Crichton to Thomas Maynard *et al.*, in trust for G. A. S. Crichton, dated 19th August, 1829. Also a deed from Thomas Maynard *et al.* to George A. S. Crichton, of 22nd July, 1835. The first of these deeds includes land on the opposite or north-west side of the First Lake, containing about 36 acres. The 36 acres were, however, exclusive of the lake, because James Crichton, Senior, by agreement of 1791,—put in among plaintiff's exhibits,—had conveyed extensive easements in relation to the lake and its shores to Hartshorne and Tremain. Before the second deed passed the title of the Shubenacadie Canal Company had been acquired, and the proceedings for expropriation were put into force (1826), and the second deed, after describing the property, adds: "Save and except out of this deed such portion of the said land at Dartmouth on the lake as hath been assigned and set over by a jury to the Shubenacadie Canal Company." No grant from the Crown is produced, whereas the plaintiff claims that the Crown and the Legislature ceded the lake to the company, as recognized by this deed. 20

As regards the embankment, ice-house and cutting at the Second Lake, the defendants claim title thus:—Grant to Christian Bartlin in 1782, of 200 acres. This grant is not identified as being a grant of any land near the *locus*. The boundaries given in it are not traceable on the ground, and the grant says, "according to the plan annexed," while no plan is produced. 30

It is alleged that this grant was partitioned among the heirs, and that lot No. 5 on the partition fell to Susan Bartlen, who married Moreland and died a widow; she devised it to her executor, who renounced, and her administrator with the will annexed, conveyed to Michael Hurley, who in 1856 conveyed to Peter Laidlaw. Peter Laidlaw's widow married Samuel Chittick, and the other defendants claim to be his servants or partners. The defendants contend that this title covers the shore of the Second Dartmouth Lake on which the embankment and ice-house stand, and they contest the expropriation by the company.

As regards the cutting of ice on the south-eastern shore of the First Lake, the defendants claim a title as follows:—They begin with the deed put in evidence by the plaintiff from the executors of James Creighton to Lawrence Hartshorne, dated 20th February, 1815. Passing by the deed from Hartshorne to Richard Tremain, 13th October, 1815, and the deed from 40



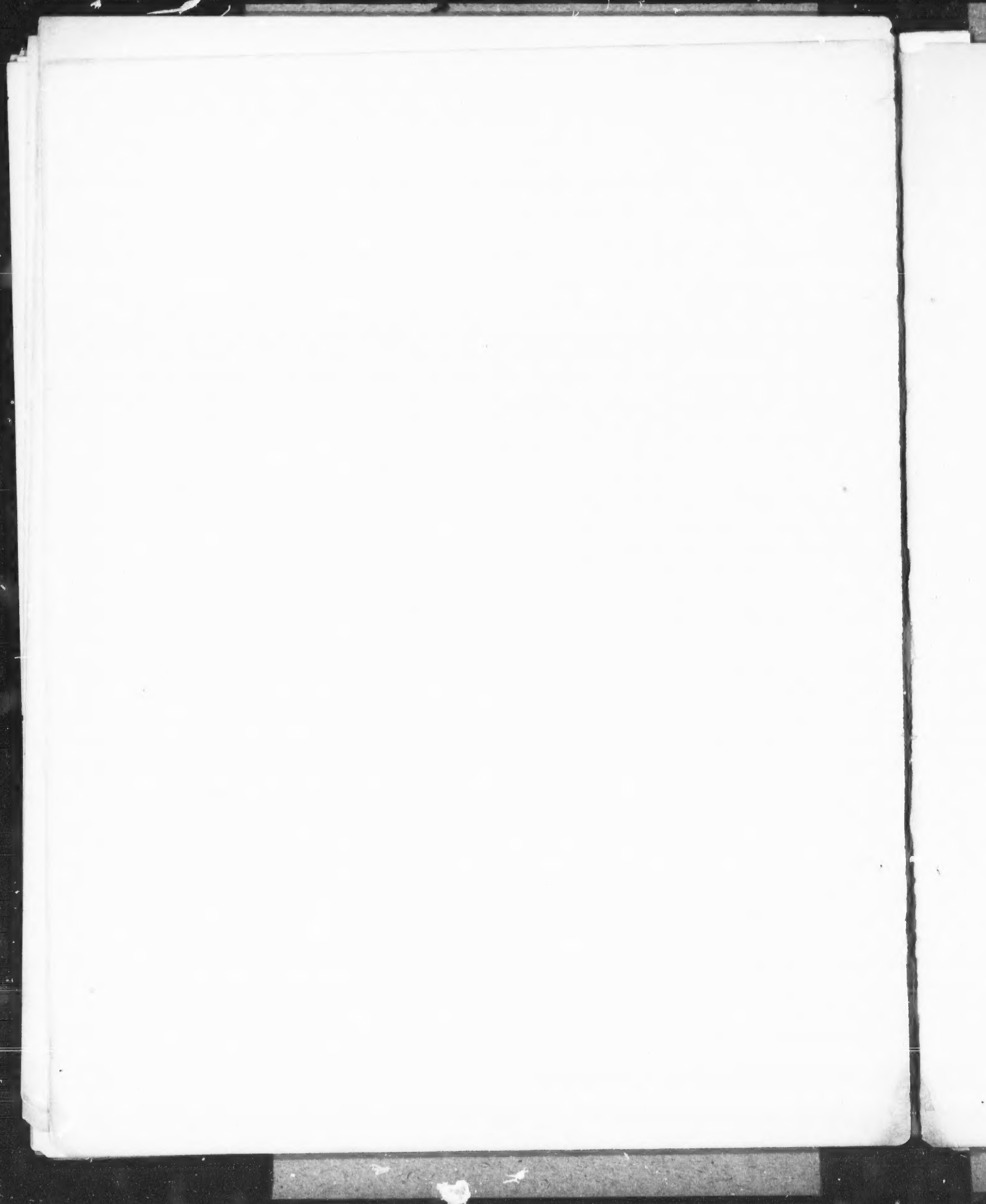
executrix and executor of Hartshorne to James Tremain, 25th October, 1828, through which the title passed out of Hartshorne (so far as the margin of the lake is concerned) to the Shubenacadie Canal Company; they go on to the will of Lawrence Hartshorne,—set out among plaintiff's exhibits in the Bill of Complaint in the cause of *Ingles et al. v. Hartshorne et al.* This will directed his real estate, excepting his dwelling house, to be divided among his children, who were seven in number, and who entered into the Chancery partition suit of *Ingles et al. v. Hartshorne et al.*, the proceedings in which are given among plaintiff's exhibits, the same being put in evidence by way of rebuttal. The object of this suit was to divide the real estate made divisible by the will, and a tract of upland near the Second Lake, but on the southern side of the road shown on plan AA, was so divided. See plan of division in *Ingles et al. v. Hartshorne et al.* According to this plan the following division of the upland tract tract was made :—

Lot No. 1 to Lucy Short, and marked L. S.	
" 2 to Susan Scott, " S. S.	
" 3 to Lawrence Hartshorne, Jr., and marked L. H.	
" 4 to Mary Hartshorne, " M. H.	
" 5 Ann Tremain, " A. T.	
" 6 to Hugh Hartshorne, " H. H.	
" 7 to Mrs. Inglis, " C. I.	

This closed the partition proceedings and afterwards by various conveyances these lots 20 became vested in Hugh Hartshorne. These lots however, do not cover any part of the *locus* trespassed on, which was on the lower side of the road. After this suit was thus disposed of, and all the real estate mentioned in the inventory in that suit (which was an inventory of the real estate of which Lawrence Hartshorne died seized), Lawrence Hartshorne the executor attempted to convey to each one of the heirs a water lot in front of his or her upland lot, and these last lots went below the road, included the margin of the lake and part of its waters, taking indeed—if such conveyances could—the tract conveyed in two moieties, one moiety by the testator Lawrence Hartshorne to Richard Tremain, the other moiety by the executrix and executor to James Tremain, and the whole of which had been conveyed in 1831 by Richard and James Tremain to the Shubenacadie Canal Company. All the seven 30 heirs of Lawrence Hartshorne conveyed this second range of lots (being fictitious, according to the plaintiff's contention.) to Hugh Hartshorne.

The declaration charges, in the first count, a breaking and entering of plaintiff's close and lands known as section No. Two of the Shubenacadie Canal, and forming the reservoir thereof, and called the First and Second Dartmouth Lakes, &c., and on the lands bordering the said lakes, and upon the margin thereof, and with throwing large quantities of stone thereon, and driving posts and stakes therein, and erecting buildings and cutting ice thereon. The second count repeats the same charge and adds that defendants cut and carried away the ice formed thereon and converted the same to their own use. The third count is in trover for 5000 tons of ice. Three other counts are added, charging these trespasses as having been committed 40 against Lewis P. Fairbanks, the insolvent.

The defendants plead to the first and second counts, 1st, that they did not commit the alleged trespasses; 2nd, that the close and ice were not the property of plaintiff, and denying



his possession; 3rd, that the close and ice were the property of defendants; 4th, that the close and ice were the property of Johnston Chittick and Jessie Chittick his wife and Annie Laidlaw, and that he in his own right, and the other defendants as their servants, did what is complained of; 5th, license and command of George A. S. Crichton. To the third count the pleas are, 1st, a denial of the conversion; 2nd, a denial of the plaintiff's property. To the remaining count they plead a denial of the conversion charged as having been made against the insolvent, and that the ice was not his. The concluding plea is as follows:—"And for a plea to the plaintiff's declaration the defendants say that the said William H. Creighton was not nor is such assignee as alleged."

The Supreme Court of Nova Scotia gave judgment for defendants on the ground that Fairbanks was not a trader. 10

REASONS IN SUPPORT OF THE APPEAL.

1st. There was ample evidence that Fairbanks was a trader. The Assignee said at line 62, "Fairbanks bought and sold all sorts of things. I had dealings with him. He bought oats and wood and iron." The Supreme Court said, "We all do that when necessary," and thence concluded that Fairbanks could not be a trader.

Insol. Act of 1875, Sec. 1.

Doria, 1874, p. 113, cited in Wortherspoon, p. 3.

Patman v. Vaughan, 1 T. R., 572.

Cannon v. Denny, 10 Bing., 292.

Ex-parte Moule, 14 Ves. 603.

Ex-parte, McGinnis, Rose, 84.

2nd. It was not necessary, as the Supreme Court of N. S. seemed to adjudge it to be, that in order to make the Insolvent a trader within the meaning of the Act, he should have assets and books which had resulted from his trading business.

Ex-parte Dewdney, 15, Ves. 495.

" Bamford, 15, Ves. 458.

Doe v. Laurance, 2 C. & P., 134.

Baillie v. Grant, 9 Bing., 121, 6 Bligh, 459.

Willoughby v. Thornton, 1 Selw., N. P. 175.

Dane v. Holdsworth, Peake, 64.

3rd. The Supreme Court of N. S. had no ground for the assertion that "his business had relation solely to this Canal property," and even if it had, he might still have been a trader. If he bought the Canal property for the purpose of dividing it, selling it in parts, and selling the machinery, in course of his general business, (which he says he did sell at line 127,) that would be evidence that he was a trader.

4th. There was no reason for the Court assuming that the debts incurred by the Insolvent, as a trader, were barred by the Statute of Limitations. This was mere conjecture.

5th. The only plea raising this issue, was the last, which denied that Plaintiff was Assignee. The Assignment and the evidence of the meeting of creditors, etc., were proofs of this. The issue only required Plaintiff to shew that he was *de facto* Assignee. The proceedings in Insolvency should be sufficient until set aside. 40



6th. The denial of Fairbanks being a trader, should have been made explicitly in the pleas, especially in view of the following section, 152 of chapter 94, Revised Statutes of N. S., 4th Series: "The general issue and all general pleas are abolished, and every pleading shall specify, particularly and concisely, the facts intended to be denied."

Grotto vs. Farish, Thomson's Rep. 291.

Church wardens vs. Vaughan, 2 Russ. & Ches., 443.

7th. The certificate from the officer of the Court was at least *prima facie* evidence of Fairbanks being an Insolvent, and having regularly and properly assigned, and of the plaintiff's appointment, and of the regularity of all proceedings, antecedent to the certificate.

Insol. Act of 1875, Sec. 144.

10

8th. On the question of fact as to Fairbanks having been a trader, there was *some* evidence at least for the Plaintiff, and none for the Defendants. The verdict in the Plaintiff's favor, therefore should not have been disturbed, and was a finding of that issue in plaintiff's favor.

9th. Plaintiff showed a complete title to the locus, and proved the trespasses thereon, and the verdict affirmed his evidence as to all the trespasses alleged.

10th. Defendants' attempts to prove title, failed. Their defence of license from G. A. S. Crichton could not avail them. Their title did not go back far enough, and it contained a reservation of the rights of the Shubenacadie Canal Company, the plaintiff's grantors. Their defence under the Hartshorne title cannot avail them, because Lawrence Hartshorne in his life time and his Executrix and Executor after his death conveyed all the property between the road and the Lake and in the Lake to the Tremains who conveyed to the Shubenacadie Canal Company. The making of conveyances after his death and after all his real estate had been partitioned in the suit of Ingles, et. al., v. Hartshorne, et. al., to cover this tract, was clearly an after-thought, and an attempt to make title, as the absence of any such property from the Inventory Inglis, et. al., vs. Harthorne, et. al., shows. The attempt to establish title under the Bartlen grant failed—the grant could not be located—it professed to grant "according to plan annexed" and the plan was not produced. Mr Hendry's attempt to locate it would make it apply as well to any other part of the country; there was no internal evidence of the land granted being near any of the lakes, much less being part of the lakes as was contended; reputation of part of the locus being considered part of the grant would not suffice; the Administrator of Moreland could not convey, he was not the devisee, and no proof was given that he took any of the proceedings by which, without devise, such a person can convey, or that he really was Administrator.

20

30

11th. The plea that the locus, ice house, etc., was the property of Johnston Chittick and Jessie Chittick and Annie Chittick, was not proved.

12th. There was at any rate no defence made as to the trespasses and conversion connected with that part of the locus in front of the embankment and ice house, or as to the hauling of the ice off the First and Second Lakes. Defendant, Samuel Chittick admitted (line 202) virtually that he did not own any lands in or under the Lake; he says his property is *bounding* on the Lake.

40